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No. _____

In The Supreme Court of the United States

LAURENCE MACK, WARDEN,
Petitioner,

v.

DAVID L. PARIS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether counsel's misfeasance during state post-conviction proceedings can serve as "cause" for the procedural default of a habeas claim, when the attorney error does not itself present a valid habeas claim.

Whether a federal habeas court may order a retrial, rather than a new state-court appeal, after granting a habeas petition based solely on grounds of ineffective assistance of appellate counsel.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of Laurence Mack, Warden, respectfully petitions for a writ of certiorari to review and reverse the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The final opinion of the court of appeals reversing the district court and ordering the district court to issue a writ of habeas corpus conditioned on a new criminal trial in state court (Pet. App. 1a-11a) is unreported. The original opinion of the court of appeals affirming the district court (Pet. App.

14a-22a) is unreported. The opinion of the district court (Pet. App. 23a-26a) is unreported. The two reports and recommendations of the magistrate judge (Pet. App. 27a-44a) are unreported. The opinion of the Ohio Supreme Court (Pet. App. 45a-46a) is reported at 76 Ohio St. 3d 270, 667 N.E.2d 390. The opinion of the Ohio court of appeals (Pet. App. 47a-49a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 26, 1999. The court of appeals denied a petition for rehearing on August 19, 1999. Pet. App. 12a-13a. On November 12, 1999, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including January 16, 2000. (App. No. 99A410.) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

3. Relevant provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, 28 U.S.C. 2254(b)(1), provide:

§ 2254. State custody; remedies in Federal courts

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(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

4. Rule 26(B)(1) of the Ohio Rules of Appellate Procedure provides in relevant part: "A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time."

INTRODUCTION

This petition presents an issue closely related to the issue now before the Court in *Edwards v. Carpenter*, No. 98-2060 (scheduled for oral argument on February 28, 2000). Thus, it would be appropriate for this Court to defer consideration of this petition until the issuance of its decision in *Edwards*, and then consider whether to dispose of this petition by issuing a summary order reflective of *Edwards*. At this juncture, we can anticipate that such a summary order might take one of two forms: *either* an order vacating the judgment below and directing the Sixth Circuit to reconsider

its decision in light of the holding and principles articulated in *Edwards*, or an order reversing and remanding the Sixth Circuit's judgment for the additional reason that the Sixth Circuit's erroneous decision on the *Edwards*-related issue in *this* case was predicated on a further serious error of federal habeas law.

Edwards and this case share the following issue in common: whether attorney misfeasance that is *not* independently cognizable as a federal habeas claim may nonetheless serve as "cause" for the procedural default of a habeas claim. To be sure, this common question arises in different specific contexts. In *Edwards*, the attorney misfeasance that the prisoner points to as the cause for his default is not independently cognizable because he also procedurally defaulted the ineffective-assistance claim itself. Here, the attorney misfeasance that the prisoner offers as the cause for his default is not independently cognizable because the attorney error occurred during state post-conviction proceedings, where there is no Sixth Amendment right to counsel at all. *See Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion); *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987).

While the Court has never suggested that state prisoners enjoy a constitutional right to the assistance of counsel in post-conviction proceedings, we recognize that some prisoners have argued that "there must be an exception to the rule of *Finley* and *Giarratano* in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction." *Coleman v. Thompson*, 501 U.S. 722, 755 (1991) (declining to "answer this question broadly"). As far as we are aware, every post-*Coleman* circuit court that *has* addressed that question, however, has declined to create such an exception to *Finley* and

Giarratano. Though the Sixth Circuit did not expressly address the question in this case – and has not done so in any of its previous decisions – that question could be presented and resolved here.

We respectfully suggest, however, that the more appropriate disposition of this petition might be an order remanding the case once the Court issues its decision in *Edwards*. Though the court of appeals could have addressed whether the possible exception noted in *Coleman* should be recognized in the Sixth Circuit, the court did not do so. Instead, it simply assumed – quite erroneously – that attorney misfeasance in a post-conviction proceeding may constitute "cause" for a procedural default, regardless of whether that post-conviction proceeding was the first place where the prisoner could have raised his constitutional claim. That decision goes way too far, and, as the dissenting judge on the panel noted, Pet. App. at 7a, actually conflicts with this Court's decision in *Coleman*, where the Court "reiterate[d] that counsel's ineffectiveness will constitute cause only if it is an independent constitutional violation." *Coleman*, 501 U.S. at 755.

The Sixth Circuit's mistaken assumption in this case is precisely analogous to the mistake it made in *Edwards*. In both cases, the court of appeals allowed attorney misconduct to excuse a prisoner's procedural default without first determining whether the attorney misconduct itself presented a proper basis for habeas relief. For this reason, we believe that an appropriate disposition of this petition would be a remand in light of *Edwards*. On remand, the Sixth Circuit may address for the first time the issue left open in *Coleman*, along with any other issues unresolved by *Edwards* itself.

STATEMENT

1. State court proceedings. Respondent David L. Paris was convicted and sentenced by an Ohio trial court in 1991 for the crime of felonious assault. The charge stemmed from the beating of Paris's two-year-old stepson, who had been struck with a belt, a flashlight and fists. After a jury found Paris guilty of the crime, the state trial court sentenced him to a prison term of eight to fifteen years.

Paris appealed (through counsel), alleging that the evidence presented at his trial warranted a jury instruction only on the crime of assault, rather than instructions on that crime and the more serious crime of felonious assault, both of which were explained by the trial court to the jury at Paris's trial. The Ohio court of appeals affirmed, however, *see* 1992 WL 63387 (March 26, 1992), and Paris did not appeal this decision to the Ohio Supreme Court.

On July 1, 1993, Rule 26(B) of the Ohio Rules of Appellate Procedure took effect. The relevant portion of that rule is reproduced on page 3 of this petition. The Ohio Supreme Court adopted that rule after holding that in Ohio, a claim of ineffective assistance of *appellate* counsel must be raised not in a state trial court, but rather through an application for reconsideration filed in the state court of appeals. *State v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992). The 1993 rule, which still governs ineffective-assistance-of-appellate-counsel claims in Ohio, gives criminal defendants 90 days – starting with the date on which the court of appeals files its judgment in the defendant's original state-court direct appeal – to raise such ineffective-assistance claims.

On August 10, 1995 – over two years after the new 90-day rule took effect – Paris (through new post-conviction counsel) filed a Rule 26(B) ineffective-assistance-of-appellate-counsel claim with the Ohio court of appeals. Paris alleged that his appellate counsel in his original appeal in 1991-92 had provided ineffective assistance by failing to challenge the trial court's admission at trial of certain out-of-court statements by a four-year-old witness. (The trial court had admitted those out-of-court statements after concluding that they fell within the excited-utterance exception to Ohio's hearsay rule.)

The state court of appeals did not reach the merits of Paris's Rule 26(B) application, however, and thus did not decide the merits of his ineffective-assistance argument. Instead, the court dismissed the application on October 23, 1995, finding that Paris had missed the 90-day window for filing such a claim under Rule 26(B). Pet. App. 48a-49a.[1] The appeals court found that Paris's reason for filing a late request to reopen his direct appeal – the heavy workload of his post-conviction counsel – was not "good cause" for his untimely application in 1995. Pet. App. 49a. (Paris had evidently asked the Ohio public defender's office to represent

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[1] The state court of appeals' October 1995 opinion faults Paris for not filing his Rule 26(B) application within 90 days after that court's original March 26, 1992 judgment that affirmed Paris's conviction in his direct appeal. In fact, Rule 26(B)'s 90-day requirement did not take effect until July 1, 1993 – more than a year after that original state-court judgment in Paris's direct appeal. Paris was therefore actually obligated to comply with Ohio's former Appellate Rule 26 in 1992. *See State v. Reddick*, 72 Ohio St. 3d 88, 90, 647 N.E.2d 784, 786 (1995). In any event, Paris's August 22, 1995 application for reopening of his direct appeal was untimely under both the former and current versions of Ohio's Appellate Rule 26.

him in state post-conviction proceedings in July, 1992, after learning that month that he had lost his direct appeal four months earlier. The state public defender's office took no action on Paris's behalf until three years later, when one of its lawyers filed the untimely Rule 26(B) application.)

Paris appealed, but the Ohio Supreme Court affirmed the dismissal of his Rule 26(B) application without reaching the merits of the ineffective-assistance-of-appellate-counsel claim. Like the state court of appeals, the Ohio Supreme Court found that Paris had simply missed the deadline for raising such a claim in Ohio's courts. *State v. Paris*, 76 Ohio St. 3d 270, 667 N.E.2d 390 (1996) (*per curiam*). Pet. App. 45a-46a. The Ohio Supreme Court's one-line order reads simply: "We affirm the judgment of the court of appeals for the reasons stated in its decision. *See State v. White* (1995), 72 Ohio St. 3d 91, 647 N.E.2d 787." The reference to *White* makes clear that the state supreme court, like the court of appeals, never addressed the merits of Paris's ineffective-assistance claim, and dismissed the Rule 26(B) application solely on state procedural grounds. In *White*, the court had declined to reach the merits of an ineffective-assistance claim where the prisoner – citing his post-conviction counsel's heavy workload as the cause for his delay – had missed the Rule 26(B) filing deadline, just like Paris.

2. Federal habeas proceedings. On October 21, 1996 (soon after the effective date of AEDPA), Paris filed a petition for a writ of habeas corpus under 28 U.S.C. 2254 in federal district court. He alleged only one ground for habeas relief: the ineffective-assistance of his appellate counsel in violation of the Sixth and Fourteenth Amendments.

A U.S. magistrate judge determined that Paris had procedurally defaulted his ineffective-assistance claim by

failing to comply with Ohio's procedural rule, Rule 26(B), for raising such a claim. Pet. App. 31a. Searching for the cause of that default, the magistrate judge noted that Paris's lawyer on direct appeal never told Paris about the judgment in that direct appeal, and Paris did not learn that he had lost the appeal until roughly 120 days after the state appellate court issued that judgment – well beyond the 90-day window for raising a post-conviction challenge to appellate counsel's effectiveness under Rule 26(B). Were that the sole reason for Paris's late Rule 26(B) filing, he would have shown cause for his default of the ineffective-assistance claim, said the magistrate judge. *Id.* at 31a.

However, Paris's reason for the additional three-year delay once he *did* learn of the judgment in his direct appeal could not serve as cause for the default. That reason – the heavy workload of Paris's post-conviction counsel – could not excuse the late Rule 26(B) filing, said the magistrate judge, since Paris had no right to counsel at all in mounting a collateral attack on his conviction. And, according to the magistrate judge, Rule 26(B)'s deadline for raising ineffective-assistance-of-appellate-counsel claims in Ohio's state courts is an adequate and independent ground that bars federal habeas review of defaulted ineffectiveness claims. *Id.* at 42a.

The district court adopted the magistrate judge's recommendations in full on August 22, 1997, dismissing Paris's ineffective-assistance claim (and therefore his entire habeas petition) because he had procedurally defaulted that claim in state court, and could not show cause for the default. As had the magistrate judge, the district court concluded that the failure of Paris's counsel in his direct appeal to notify him of the state appellate court's judgment could have excused Paris's failure to meet Rule 26(B)'s 90-day deadline had

Paris raised his ineffective-assistance claim in state court "as soon as he discovered that his initial appeal had been denied." *Id.* at 25a. But the additional three-year delay between Paris's discovery that he had lost his direct appeal and the filing of his Rule 26(B) application in Ohio's state courts could not likewise be excused, said the district court, particularly where the Ohio Supreme Court had earlier held in the *White* case that "a delay occasioned by the heavy workload of counsel does not constitute good cause for a delay in filing a motion to reopen" under Rule 26(B). *Id.* at 25a.

Paris appealed. On March 3, 1999, in its original decision, the court of appeals affirmed the judgment, finding that Ohio's Rule 26(B) posed an adequate and independent state ground barring habeas relief in Paris's case because he had failed to comply with the Ohio rule's 90-day time limit, and could not point to the tardiness of post-conviction counsel as cause for the delay. *See id.* at 21a ("Attorney error cannot constitute cause when the error resulted in a petitioner's default in a proceeding in which he was not constitutionally entitled to counsel."). Like the district court, the court of appeals agreed that Paris could have shown cause for the default of his habeas claim had he promptly filed a Rule 26(B) application in the Ohio court of appeals once he learned of that court's judgment, but by turning his case over to new post-conviction counsel and letting those new lawyers wait three years before filing the application, Paris lost any chance of showing cause for his default. Because Paris had no right to counsel in a collateral attack on his conviction, "he bore the burden of complying with the procedural requirements of Rule 26(B). Paris sought and awaited discretionary counsel at his own peril." *Id.* at 22a. The court of appeals therefore unanimously affirmed the dismissal of Paris's habeas petition.

Paris next filed a petition for rehearing in the court of appeals. On May 26, 1999, the court of appeals granted that petition, vacating the March 3rd opinion and issuing a new order in its place. That new opinion – an unsigned order joined by Judges Merritt and Cole – concluded that Paris *could* show cause for his default in state court, because his original appellate lawyer in the direct appeal was "incompeten[t]" in 1992, and because there had been a "backlog at the Ohio Public Defenders Office" from 1992 until 1995. *Id.* at 6a.

On the performance of Paris's lawyer in the direct appeal, the court of appeals faulted that lawyer for his "fail[ure] to communicate to his client how to proceed with further appeals," and for giving Paris "no guidance on how to further appeal" once the state court of appeals affirmed Paris's conviction in March, 1992. *Id.* at 5a-6a. As for the state public defender's office, the Sixth Circuit concluded that Paris had relied on the lawyers in that office to file his Rule 26(B) post-conviction application, and could not be faulted for that new counsel's three-year tardiness in doing so. "[I]t would be unjust to blame a layman such as Paris for the backlog at the Ohio Public Defender's Office. They did not inform him that he was in danger of procedural default and as a layman it would not be evident to him that his claim might procedurally expire in the hands of the Public Defender." *Id.* at 6a.

And not only was there cause for Paris's default of his habeas claim, but he could also show prejudice, said the court of appeals, for his appellate lawyer in the direct appeal should have challenged the admission of a hearsay statement at Paris's trial. *Id.* at 6a. But rather than granting a writ of habeas corpus conditioned on the reinstatement of Paris's

direct appeal, the Sixth Circuit ordered the district court to issue the writ "giving the state a reasonable time to retry the petitioner." *Id.*

Judge Farris dissented, arguing that Paris had shown neither cause for, nor prejudice from, his state-court procedural default. On the cause issue, Judge Farris observed that "[a]fter Paris's direct appeal was denied, he had no right to counsel." *Id.* at 7a. "Therefore, the fact that after this point (1) Paris's attorney failed to communicate with him, and (2) the Public Defender was too busy to press his post-conviction claim for more than three years, cannot satisfy the legal definition of cause. Under these circumstances, Paris cannot claim that a bad lawyer is worse than no lawyer at all." *Id.* at 7a. As for the prejudice flowing from Paris's default, Judge Farris found that the majority had "improperly substitute[d] its judgment for that of the [state] trial court" on the hearsay question. He would have found the state trial court's resolution of the evidentiary issue "not unreasonable," and therefore would not have faulted Paris's appellate lawyer for not raising that issue in the direct appeal. *Id.* at 10a.

Judge Farris also disagreed with the relief ordered by the majority. Given that Paris's habeas petition alleged that he had been denied the effective assistance of counsel in his direct *appeal* in Ohio's state courts, "a more appropriate remedy would be to require the state to allow an out-of-time post-conviction appeal," thereby giving Paris the very relief he sought in his untimely Rule 26(B) application in the state courts, and in his habeas petition in federal court. *Id.* at 11a.[2]

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[2] Paris was paroled on July 2, 1998 while his appeal was pending before the court of appeals. This case is not moot, however, because he was "in custody" at the time he filed his federal habeas petition in 1996, and the federal courts therefore retain jurisdiction

3. The *Edwards* case. This case is closely tied to the pending *Edwards v. Carpenter* case, No. 98-2060, which is scheduled for argument on February 28, 2000. That case, like this one, comes from the Sixth Circuit (and from Ohio), and indeed Judge Merritt served on the panel in both the case below and in the Sixth Circuit's decision in *Edwards*, which is reported at 163 F.3d 938. As explained in the Introduction, the disposition of this petition should follow the Court's decision in *Edwards*, for both cases concern a prisoner's default under Ohio's Appellate Rule 26(B), and in both, the court of appeals allowed claims of attorney error to excuse that state-court procedural default, even though the attorney error in both cases did not itself present a valid habeas claim.

REASONS FOR GRANTING THE PETITION

The court of appeals, despite this Court's express decisions holding otherwise, has created a new constitutional right to the effective assistance of counsel in state post-conviction proceedings, and has for the first time allowed the errors of post-conviction counsel to excuse in federal habeas a prisoner's failure to comply with a State's independent and adequate procedural rule for presenting post-conviction claims in state court. Badly misreading and misapplying this Court's precedents of the past two decades, the court of appeals has opened a new avenue for state prisoners to secure federal review of defaulted claims, despite the failure of their state post-conviction lawyers to comply with state procedural rules.

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to decide his case and any subsequent appeals. *See Spencer v. Kemna*, 118 S. Ct. 978, 983 (1998); *Carafas v. LaVallee*, 391 U.S. 234, 237-38 (1968).

That decision will allow prisoners (and their post-conviction lawyers) to flout the States' rules, and then run to federal court and there raise the defaulted claims anew, despite having "deprived the state courts of an opportunity to address those claims in the first instance." *Coleman v. Thompson*, 501 U.S. 722, 732 (1991). The court of appeals has, in short, reached the merits of a federal constitutional claim in habeas that this Court could not reach on direct review, for undeniably Ohio's state courts dismissed the claim in this case on state procedural grounds without addressing the claim's merits. No other court of which we are aware has previously suggested that the missteps of state-court post-conviction counsel can revive a claim that was defaulted during a prisoner's collateral attack on his conviction – when he had no right to a lawyer at all – and surely this Court has never done so (although some prisoners, like the one in *Coleman*, have pushed for such a rule).

Though David Paris, the habeas petitioner in this case, procedurally defaulted his ineffective-assistance-of-appellate-counsel claim – by raising it too late under Ohio's procedural rules – and though that same claim attacking the work of his *appellate* lawyer is the only one that he later raised in his federal habeas petition, the court of appeals has sent his case back to square one in the state *trial* court. That decision "ignores the State's legitimate reasons for holding the prisoner," and, if left to stand, "offers state prisoners whose custody [i]s supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws." *Coleman*, 501 U.S. at 731-32. Review by this Court is therefore warranted, for the decision of the court of appeals runs counter to this Court's own long-settled precedents, and is also inconsistent with the approach followed by every other court of appeals that has considered

whether errors by post-conviction counsel can serve as cause for a procedural default as well.

1. The Sixth Circuit's inconsistency with *Coleman*. No one disputes that the States are permitted to enforce a host of procedural rules to regulate their criminal trials and appeals. As the Court has said, such rules "serve vital purposes at trial, on appeal, and on state collateral attack," *Murray v. Carrier*, 477 U.S. 478, 490 (1986), for they "channel, to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently." *Reed v. Ross*, 468 U.S. 1, 10 (1984).

And all can agree as well that federal habeas petitioners who have not complied with those State rules may nonetheless secure federal habeas review of a constitutional claim by showing both "cause" for and "prejudice" from the procedural default as described in *Wainwright v. Sykes*, 433 U.S. 72 (1977), and its progeny. Even further, the Court has already held that constitutionally ineffective assistance of counsel may serve as cause for the procedural default of a habeas claim. *See Carrier*, 477 U.S. at 489 ("a claim of ineffective assistance . . . may be used to establish cause for a procedural default").

But the Court has never said, as did the court of appeals in this case, that attorney error may serve as the cause for a procedural default when the prisoner had no constitutional right to the effective assistance of counsel at all. Indeed, this Court has said just the opposite. *See Coleman*, 501 U.S. at 754 ("In the absence of a constitutional violation, the petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation, as *Carrier* says explicitly.").

An Ohio Appellate Rule 26(B) application is a "civil, post-conviction matter," *see State v. Robinson*, 74 Ohio St. 3d 1518, 660 N.E.2d 472 (1996), and in keeping with the text of the Sixth Amendment itself (guaranteeing accused persons the assistance of counsel in "all criminal prosecutions"), this Court has long-since rejected the argument that state prisoners are entitled to the assistance of counsel in civil, post-conviction proceedings. *See Coleman*, 501 U.S. at 755; *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion); *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987).

The court of appeals' approach is squarely at odds with those decisions, and simply cannot be reconciled with *Coleman* in particular, where, as here, the state prisoner argued "that it was his attorney's error that led to the late filing of his state habeas appeal." *Coleman*, 501 U.S. at 752. Rejecting that argument, the Court explained that because "[t]here is no constitutional right to an attorney in state post-conviction proceedings . . . this case is at an end," for "counsel's ineffectiveness will constitute cause only if it is an independent constitutional violation." *Id.* at 752, 755. That is, the very argument advanced by the prisoner here and adopted by the court of appeals – that the errors of state post-conviction counsel may excuse a prisoner's procedural default in state court – was expressly rejected by the Court in *Coleman*.

While this Court declined in *Coleman* to "answer . . . broadly" the question whether there is a right to counsel in those post-conviction proceedings that offer a prisoner his *first* opportunity to raise a constitutional claim in state court, *Coleman*, 501 U.S. at 755, and while other courts of appeals that have addressed that question have uniformly declined to

create any such exception to *Finley*,[3] the court of appeals in this case never even considered the question reserved in *Coleman*, and instead ruled contrary to the holding of *Coleman* itself, for the court of appeals' opinion suggests that *any* workload-induced errors of post-conviction counsel can excuse a state-court procedural default, whether the prisoner enjoyed earlier state-court opportunities in his direct appeal to raise the claim or not.

Indeed, though the court of appeals relied on *Coleman* in its original opinion rejecting Paris's habeas claim, and though Judge Farris likewise cited *Coleman* in his dissenting opinion, the court of appeals' final opinion fails to mention *Coleman* at all. In holding that "it would be unjust to blame a layman such as Paris for the backload at the Ohio Public Defender's Office," Pet. App. 6a, and in concluding that a federal habeas court could review Paris's defaulted claim despite his failure to "abide[] by the time limitations set forth in Ohio App. Rule 26(B)," *id.* at 4a, the court of appeals simply ignored this Court's language in *Coleman*: "Attorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error [that results in a procedural default].'" *Coleman*, 501 U.S. at 753, quoting *Carrier*, 477 U.S. at 488. "Because Coleman had no right to counsel to pursue his appeal in state habeas, any attorney error that led to the default of Coleman's claims in state court cannot constitute

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[3] *See, e.g., Mackall v. Angelone*, 131 F.3d 442, 449 (4th Cir. 1997) (*en banc*), *cert. denied*, 522 U.S. 1100 (1998); *Nolan v. Armontrout*, 973 F.2d 615, 617 (8th Cir. 1992); *Bonin v. Vasquez*, 999 F.2d 425, 429-30 (9th Cir. 1993); *Hill v. Jones*, 81 F.3d 1015, 1025-26 (11th Cir. 1996), *cert. denied*, 519 U.S. 1119 (1997).

cause to excuse the default in federal habeas." *Coleman*, 501 U.S. at 757.

Apparently, all a federal habeas petitioner need do now in Ohio – and in the other states in the Sixth Circuit that likewise enforce procedural rules for raising habeas claims in state court – is ask an overworked post-conviction lawyer to handle his case once the direct appeal is over. By doing so, the prisoner no longer need comply with any state deadlines for raising post-conviction claims, for the Sixth Circuit will evidently now always excuse any post-conviction defaults when counsel is burdened by a "heavy workload." That decision ignores the States' "important interest in finality," *Coleman*, 501 U.S. at 750, and surely shows none of "the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus." *Id.* at 726.

2. The contrary precedent of other courts of appeals. No other court of appeals has allowed an attorney error that does not itself rise to a Sixth Amendment violation to serve as cause for a procedural default, nor allowed the errors of post-conviction counsel to excuse the procedural default of a habeas claim in state court. Indeed we have found no other decision agreeing with the Sixth Circuit's analysis of this important issue of habeas procedure, and that is hardly surprising in light of *Coleman*. *See, e.g., Burks v. Dubois*, 55 F.3d 712, 717 (1st Cir. 1995) ("Mere attorney error, not amounting to ineffective assistance in a constitutionally significant sense . . . is insufficient to constitute cause."); *Weeks v. Angelone*, 176 F.3d 249, 273 (4th Cir. 1999) ("For an attorney error to constitute cause . . . a petitioner must first possess a constitutional right to assistance of counsel, [and] . . . a petitioner has no constitutional right to assistance of counsel in state habeas

proceedings."), *cert. granted in part on other issues*, 120 S. Ct. 30 (Sept. 1, 1999) (No. 99-5746); *Jones v. Johnson*, 171 F.3d 270, 277 (5th Cir. 1999) ("The law is well-established . . . that such error [by state post-conviction counsel] committed in a post-conviction application, where there is no constitutional right to counsel, cannot constitute cause."), *cert. denied*, 120 S. Ct. 29 (1999); *Steward v. Gilmore*, 80 F.3d 1205, 1212 (7th Cir. 1996) ("Ineffective assistance of postconviction counsel is not itself a cognizable federal constitutional violation and may not serve as cause for a procedural default."); *Rehbein v. Clarke*, 94 F.3d 478; 484 (8th Cir. 1996) ("it is now well settled that there is no constitutional right to an attorney in state postconviction proceedings. . . . [so] even if Rehbein's postconviction counsel was ineffective . . . Rehbein has failed to demonstrate adequate cause for his procedural default"); *Ortiz v. Stewart*, 149 F.3d 923, 932 (9th Cir. 1998) (rejecting claim that a procedural default was caused by the ineffective assistance of counsel in a post-conviction proceeding, because ineffective assistance can "only constitute cause if it amounts to an independent constitutional violation," and "there is no constitutional right to an attorney in a state or federal habeas proceeding"), *cert. denied*, 119 S. Ct. 1777 (1999); *Demarest v. Price*, 130 F.3d 922, 941 (10th Cir. 1997) ("ineffective assistance of counsel in the post-conviction proceedings does not constitute cause under federal law"); *Tower v. Phillips*, 7 F.3d 206, 211 (11th Cir. 1993) ("an attorney's failure to institute timely collateral proceedings cannot excuse a procedural default").

And, like the Ohio Supreme Court, which has rejected the argument that the heavy workload of a state public defender's office can excuse a prisoner's procedural default in state post-conviction proceedings, *see State v. Wilson*, 80 Ohio St. 3d 132, 134, 684 N.E.2d 1221, 1222 (1997) ("[t]hat

counsel was 'busy' with other cases does not constitute good cause for the delayed filing"), so federal courts have likewise dismissed that excuse as the cause for a state-court procedural default. *See Fairman v. Anderson*, 188 F.3d 635, 643 (5th Cir. 1999) (where post-conviction counsel "failed to act or otherwise inadvertently allowed deadlines to pass," the habeas petitioner "demonstrates no external impediment – necessary to show 'cause' – that prevented his counsel from constructing or raising his claims"); *Tredway v. Farley*, 35 F.3d 288, 295-96 (7th Cir. 1994) (describing the heavy-workload-as-cause excuse as "squarely foreclosed"), *cert. denied*, 513 U.S. 1129 (1995); *Bannister v. Delo*, 100 F.3d 610, 624 (8th Cir. 1996) ("post-conviction counsel's case load, which allegedly was heavy and prevented him from devoting more time to this case . . . [does] not establish[] cause"), *cert. denied*, 521 U.S. 1126 (1997).

In short, the court of appeals has departed from the uniform course set by this Court and followed by all other lower courts in the wake of *Coleman*. Though "[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it," *Coleman*, 501 U.S. at 751 (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)), that principle will now mean little in the Sixth Circuit when the States there try to set deadlines for the "timely assertion" of habeas claims in state court. Such an expansive view of federal habeas power – a view so at odds with this Court's express decisions to the contrary – undercuts the States' authority to enforce their procedural rules, and tramples on the "concerns of comity and federalism . . . [that underlie] the independent and adequate state ground doctrine." *Coleman*, 501 U.S. at 730.

3. The relief ordered by the court of appeals. Not only is the court of appeals' decision so clearly erroneous on the merits, but the remedy ordered by the court is likewise unwarranted. Though Paris alleged in his habeas petition only that he had been denied the effective assistance of appellate counsel (because he claims that the lawyer who handled his direct appeal ought to have raised a particular issue, but did not), the Sixth Circuit has granted the habeas writ conditioned on a state-court *retrial* of Paris. Even if a federal habeas court can review Paris's defaulted ineffective-assistance claim, and even if that claim has merit, the relief granted by the court of appeals – relief that forces the State to go to the much greater expense and burden of retrying him – seems inappropriate when all that he sought in federal court was a fresh opportunity for a state-court appeal. *See* James S. Liebman and Randy Hertz, *Federal Habeas Corpus Practice and Procedure*, Vol. 2, § 33.4 n.2 and cases cited therein (3rd ed. 1998).

Yet again, then, the court of appeals has shown its low regard for state court procedures, for even if Paris has properly presented a valid ineffective-assistance-of-appellate-counsel claim to the federal courts, the state court of appeals is surely entitled to review the merits of the claim that Paris never presented in his direct appeal due to his counsel's alleged errors there. By reviewing not just the merits of the ineffective-assistance claim itself, but also the merits of the claim that Paris's lawyer failed to raise in the state court of appeals, the Sixth Circuit has once more "deprived the state courts of an opportunity to address those claims in the first instance." *Coleman*, 501 U.S. at 732.

4. The disposition of this petition. For the foregoing reasons, there is no doubt that the court of appeals committed plain error in this case. The court simply assumed

that misfeasance by post-conviction counsel could serve as "cause" for a procedural default, even though the prisoner has no Sixth Amendment right to post-conviction counsel at all. This assumption, however, is unambiguously contradicted – as the dissent below observed – by this Court's decisions in *Carrier* and *Coleman*, which held that attorney error cannot serve as the cause for a procedural default unless the attorney error qualifies as a Sixth Amendment violation. Because of this plain error, this case warrants a summary order from this Court reversing the Sixth Circuit's decision.

This summary reversal is warranted even considering the issue left open in *Coleman* about whether prisoners enjoy a Sixth Amendment right to counsel in post-conviction proceedings when collateral review offers them their first opportunity to raise particular constitutional claims, such as ineffective-assistance-of-appellate-counsel. Because the court of appeals did not even address this question at all, but instead erroneously assumed that it did not matter for "cause" purposes whether the misconduct of post-conviction counsel qualifies as a Sixth Amendment violation, the court's decision should be vacated. On remand, the court of appeals can address the issue left open in *Coleman* about a possible exception to *Finley*. Indeed, an order from this Court directing the court of appeals to consider that question might well be appropriate, for just as other courts of appeals have addressed that question, the court below could and should have done so here.

But because the court of appeals' plain error in this case is so closely related to its equivalent error in *Edwards* – in both cases the court of appeals allowed attorney misfeasance to excuse a state-court default, even though the attorney misfeasance could not itself serve as an independent basis for federal habeas relief – a decision on this petition

should be postponed pending the outcome of *Edwards* itself. If this Court adopts in *Edwards* the analysis we have advocated there – including the basic principle that *a federal habeas court should not let attorney misconduct serve as cause for a procedural default unless the state courts could or should have granted relief for the attorney misconduct itself* – then it would be appropriate for the Court to remand this case to the court of appeals for further consideration in light of *Edwards*. In any event, this Court will be in a better position, after having resolved *Edwards*, to judge exactly what order would be most appropriate in this case.

CONCLUSION

The petition should be held pending this Court's decision in *Edwards v. Carpenter*, No. 98-2060, and then the Court either should vacate the judgment in this case and remand for further proceedings in light of *Edwards*, or should reverse and remand for further consideration consistent with this Court's previous decisions in *Carrier* and *Coleman*.

Respectfully submitted,

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